# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>January 28, 2014 |
| v | No. 311883<br>Macomb Circuit Court |
| TOBY THOMAS MORRISON,<br><br>Defendant-Appellant. | LC No. 2012-000337-FH |

Before: STEPHENS, P.J., and M. J. KELLY and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of involuntary manslaughter, MCL 750.321. He was sentenced to 48 months to 15 years in prison. We affirm.

## I. FACTUAL BACKGROUND

The victim and his friend, Brent Denis, were at J.P. Shakers bar in Warren, Michigan, watching a baseball game. Defendant also was there with his friend, and did not know the victim. Both groups of men had been drinking alcohol. Around 1:00 a.m., defendant and his friend went outside to smoke cigarettes. The victim came outside as well, and made a comment to a female regarding touching her buttocks, which prompted the female to laugh. According to defendant's friend, defendant then approached the victim, "got up in [the victim's] face," and commented that the victim's behavior was inappropriate.

As Denis exited the bar, he heard defendant and the victim arguing. Denis confronted both men and attempted to separate them, pushing them apart from each other.[1] Yet, defendant and the victim continued to argue. Defendant then pushed the victim, causing him to fall to the ground.

[1] Denis acknowledged that when previously testifying he only mentioned shoving defendant. However, Denis explained that no one had asked him if he had pushed the victim as well. According to Denis's trial testimony, he pushed the victim one way and defendant the other.

The victim rose and quickly approached defendant. According to Denis, the victim unsuccessfully attempted to shove defendant, and defendant punched the victim in the face. Defendant's friend testified that he was fairly certain defendant punched the victim. After being hit, the victim spun, fell straight backward, and landed on cement. According to Denis, defendant continued to advance toward the victim, but Denis intervened, grabbing defendant. Defendant tried to kick Denis in the groin region and then tried to reverse "head butt" Denis from the back.

The security personnel from the bar eventually intervened and detained defendant until the police arrived. The victim lay nonresponsive on the ground. He was bleeding heavily from the nose and mouth, and was making gurgling noises. He died from his wounds, and the medical examiner testified that the cause was blunt force trauma to the head and complications thereof. Defendant was convicted of involuntary manslaughter, MCL 750.321, and was sentenced to 48 months to 15 years in prison. Defendant now appeals.

## II. REBUTTAL WITNESS

### A. STANDARD OF REVIEW

Defendant first challenges the trial court's denial of his request to introduce rebuttal evidence. "Admission of rebuttal evidence is within the sound discretion of the trial judge and will not be disturbed absent a clear abuse of discretion." *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). An abuse of discretion occurs "when the trial court chooses an outcome falling outside this principled range of outcomes." *People v Reincke*, 261 Mich App 264, 268; 680 NW2d 923 (2004) (quotation marks and citation omitted).

### B. ANALYSIS

During cross-examination, defendant asked the detective involved in the case about the amount of force police officers were trained to use when an individual charged them. Defense counsel then attempted to call an expert witness to rebut the detective's testimony. The trial court denied defendant's request, as he had not provided notice of the expert witness and, more importantly, the proposed testimony was not relevant because neither defendant nor the victim were police officers. Defendant renewed his request before jury instructions were given, and while the trial court again denied it, it struck the detective's testimony regarding the standards of police officer force.

While defendant now claims error requiring reversal, this ignores the trial court's ruling striking the detective's testimony on the disputed issue. Thus, defendant has failed to address what error is left for us to correct. Furthermore, defendant elicited the disputed testimony from the detective during cross-examination, over the prosecution's objections. Defendant now claims that he was entitled to rebut the evidence that he solicited, and that the trial court erred in holding otherwise. As we have previously acknowledged, a defendant may not contribute to an alleged error and then claim it as error requiring reversal on appeal. *People v Witherspoon*, 257 Mich App 329, 333; 670 NW2d 434 (2003).

Moreover, even if we were to review this issue, defendant has not established that the trial court abused its discretion. The desired rebuttal evidence was not relevant. Relevant

evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *People v Watkins*, 491 Mich 450, 470; 818 NW2d 296 (2012). In the instant matter, the amount of force police officers may be trained to use when arresting an individual was not a fact of consequence at trial, as the physical altercation in this case did not involve police officers. Furthermore, this evidence posed the risk of confusing or misleading the jury. The jury could easily have conflated the two unrelated topics, leading to an unreliable verdict. See MRE 403 ("[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues, or misleading the jury[.]").[2]

Defendant has failed to demonstrate any error requiring reversal in the trial court's denial of his request to call a rebuttal witness.

## III. GREAT WEIGHT OF THE EVIDENCE

### A. STANDARD OF REVIEW

Defendant next contends that the verdict was against the great weight of the evidence. Because defendant did not raise this argument in a motion for a new trial, the issue is unpreserved, and will be reviewed for plain error affecting substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).[3]

### B. ANALYSIS

The verdict was not against the great weight of the evidence. A verdict is against the great weight of the evidence when "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). "Generally, a verdict may be vacated only when the evidence does not reasonably support it and it was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence." *Id.* A defendant's argument that there was conflicting testimony is an insufficient basis for granting a new trial, even if that testimony has been impeached. *Id.* Furthermore, issues of credibility are within the jury's discretion. *Id.*

Involuntary manslaughter is the "unintentional killing of another, without malice, during the commission of an unlawful act not amounting to a felony and not naturally tending to cause

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[2] Because the rebuttal evidence had no bearing on whether defendant acted in self-defense in this case, the trial court's ruling did not deny defendant the constitutional right to present a defense. *People v King*, 297 Mich App 465, 473; 824 NW2d 258 (2012).

[3] While defendant orally moved for a JNOV at sentencing, he did not bring a motion for a new trial nor did he specify a great weight challenge. Moreover, even if we were to consider this issue preserved, defendant would not be entitled to relief for the reasons cited herein.

great bodily harm; or during the commission of some lawful act, negligently performed; or in the negligent omission to perform a legal duty." *People v Mendoza*, 468 Mich 527, 536; 664 NW2d 685 (2003). In regard to defendant's claim of self-defense, "once the defendant injects the issue of self-defense and satisfies the initial burden of producing some evidence from which a jury could conclude that the elements necessary to establish a prima facie defense of self-defense exist, the prosecution bears the burden of proof to exclude the possibility that the killing was done in self-defense." *People v Dupree*, 486 Mich 693, 709-710; 788 NW2d 399 (2010) (quotation marks and citation omitted).

Defendant contends that the prosecution failed to prove that he did not act in self-defense. He argues that the evidence did not support the verdict, as Denis escalated the argument into a physical altercation and the victim approached defendant in an aggressive manner. However, this argument is a characterization of the evidence that the jury was not obligated to accept. *Lacalamita*, 286 Mich App at 469. Denis testified that he was trying to deescalate the confrontation when he engaged in physical contact with both men, attempting to separate them. Denis further testified that after separating the two men, they continued to argue, which is when defendant initiated the physical confrontation with the victim.

Both Denis and defendant's friend saw defendant shove the victim, causing him to fall. Only after defendant pushed the victim to the ground did the victim rise and aggressively approach defendant. When the victim tried, but failed, to shove defendant backward, defendant punched the victim in the face with such force that the victim fell to the cement. The victim died from his injuries. The jury also was afforded the opportunity to view a surveillance video of the incident, and reached its verdict based on its observations.

Because defendant has not demonstrated that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand, he is not entitled to relief. *Lacalamita*, 286 Mich App at 469.

## IV. JURY INSTRUCTIONS

### A. STANDARD OF REVIEW

Defendant lastly argues that the trial court erred in omitting a jury instruction regarding Denis's prior testimony. This Court reviews "a claim of instructional error involving a question of law de novo, but we review the trial court's determination that a jury instruction applies to the facts of the case for an abuse of discretion." *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010).

### B. ANALYSIS

Defendant contends that Denis gave conflicting testimony at the preliminary examination and trial about what transpired the night in question. Defendant briefly concludes that "[t]he jury should have been told that it could consider Mr. Denis's testimony both for substantive and impeachment purposes. The trial court's failure to so instruct denied Defendant a fair trial." However, defendant has offered no further analysis or legal support for his perfunctory conclusions. He does not specifically identify the conflicting statements in his argument nor

does he provide any legal support for the conclusion that he was entitled to a different jury instruction.[4]

As we have repeatedly recognized, "'[i]t is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow.'" *People v Waclawski*, 286 Mich App 634, 679; 780 NW2d 321 (2009), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). We further note that when questioning Denis, defendant did not request that Denis's prior testimony be admitted as substantive evidence of guilt, nor did the trial court make such a ruling. Thus, defendant has failed to present any error requiring reversal.

## V. CONCLUSION

Defendant has failed to establish that the trial court erred in refusing to allow the rebuttal witness or the requested jury instruction. Furthermore, the verdict was not against the great weight of the evidence, and defendant has not established that he was entitled to a different jury instruction. We affirm.

/s/ Cynthia Diane Stephens
/s/ Michael J. Kelly
/s/ Michael J. Riordan

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[4] In fact, defendant argues on appeal that he should have been given CJI2d 4.5(1). However, the trial court did give that instruction, and it was CJI2d 4.5(2) that the trial court refused. CJI2d 4.5(1), for prior inconsistent statement used to impeach a witness, states:

> If you believe that a witness previously made a statement inconsistent with [his / her] testimony at this trial, the only purpose for which that earlier statement can be considered by you is in deciding whether the witness testified truthfully in court. The earlier statement is not evidence that what the witness said earlier is true.

CJI2d 4.5(2), for prior inconsistent statements used both to impeach and as substantive evidence, states:

> Evidence has been offered that one or more witnesses in this case previously made statements inconsistent with their testimony at this trial. You may consider such earlier statements in deciding whether the testimony at this trial was truthful and in determining the facts of the case.